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IN THE

Supreme Court of the United States

No. 821

JACOB J. GREENWALD,
Appellant.

v.

STATE OF MARYLAND,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND.

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

The Appellant appeals from the Mandate of the Court of Appeals of Maryland, case No. 50, September Term 1959, filed on January 14, 1960, in the case of *Jacob J. Greenwald v. State of Maryland*, 155 A. 2d 894, affirming conviction by the Circuit Court for Talbot County entered on April 17, 1959, on the charge of perjury, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the Appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Court of Appeals of Maryland is reported in 155 A. 2d 894 and Md. , the companion case of *Jacob J. Greenwald v. State of Maryland*, No. 43,

which is a conviction of conspiracy growing out of the same factual situation as reported in A. 2d and Md.

JURISDICTION

This suit was brought under Title 28 U.S.C. Sec. 1257(2) to reverse the Court of Appeals, the highest Court of the State of Maryland, whose Mandate was filed April 17, 1959, and Notice of Appeal was filed in that Court on February 4, 1960. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28 U.S.C. Sec. 1257(2). The Statute referred to here is not the same Statute pursuant to which the case was brought referred to above.

The cases believed to sustain the Supreme Court's jurisdiction are: *Largent v. Texas*, 318 U.S. 418; *Dahnke Walker Co. v. Bondurant*, 257 U.S. 282.

QUESTIONS PRESENTED

I. The Appellant contends that his conviction of the crime of perjury under Article 62, Section 11(b) of the Annotated Code of Maryland, violated his rights under the Maryland Declaration of Rights and the United States Constitution in that this penal statute is inapplicable to unsworn statements and that there was in fact no perpetration of the crime of perjury.

II. The Appellant contends that Article 62, Section 11(a) and Article 62, Section 11(b) of the Annotated Code of Maryland are in direct conflict regarding penal provisions and that this conflict creates an irreconcilable difference, making the entire penal provision of Article 62 unconstitutional and in the alternative makes the greater punishment abrogated by the lesser punishment.

III. That the Appellant moved at the beginning of the trial to require the State to elect as to whether it was proceeding under Section 11(a) or Section 11(b), the Court denied the motion but remarked "whether . . . he should be punished under Section 11(a) or 11(b) is a matter to be considered, if and when that point in the case is reached". (T. 1, E. 6-7 Appellant's Brief). That the Appellant was deprived of his constitutional rights of being apprised of what statutory provision he was purported to have violated, that the indictment was silent as to this, thus violating the Appellant's constitutional rights.

STATEMENT OF THE CASE

On July 14, 1958, there were found by the grand jury of Cecil County, Maryland, 85 indictments against the Appellant, Jacob J. Greenwald, a practicing physician. These indictments fell within two general categories. Forty-two of them charged that the defendant had unlawfully and knowingly made materially false statements to the effect that he had physically examined certain named female persons, and that he found them to be pregnant, when in fact the females named had not been physically examined and were not pregnant, for the purpose of assisting them in obtaining a marriage license. The remainder of the indictments, forty-three, charged that the defendant had unlawfully conspired to commit the offenses with which the first forty-two indictments charged him. The Appellant never made affidavits as to pregnancy, but made a writing that indicated an examination revealing pregnancy. On October 10, 1958, the case was removed to Talbot County because the press and radio notoriety made it virtually impossible for the defendant to be tried fairly in Cecil County. The defendant was found guilty as charged and then found guilty under the conspiracy indict-

ment. He was sentenced to three years for committing the substantive offense and three years for conspiring to commit it, the two terms to run concurrently.

HOW THE FEDERAL QUESTION IS PRESENTED

In the Circuit Court for Talbot County the Appellant, by counsel raised constitutional questions, stating in a *Motion to Dismiss Indictments* pursuant to Rules of Criminal Procedure, among other reasons assigned, that the indictments are uncertain, insufficient, vague and indefinite, that the indictments fail to set forth any offenses with sufficient certainty so as to acquaint defendant of the accusation against which he is to be tried so as to bar any subsequent prosecution for the same offenses; and that Section 11(b) of Article 62 is unconstitutional. The offense was not perjury and cannot be classified as perjury; and if the crime is not perjury, that the Legislature had no constitutional right to fix the penalty for such offense, the same as the penalty for perjury. That the infliction of a punishment for perjury for something that is not perjury is unconstitutional both under the Maryland and Federal Constitutions and violates those basic guarantees to which defendants in this State are entitled.

The Appellant further raised the Federal question in *Additional Motion to Dismiss Indictment* wherein he stated: That Section 11 of Article 62 of the Annotated Code of Maryland, purports to enact two separate and distinct penalties or punishments for a violation of the provisions of Section 9(a) of said Article — "That where there are two sections of a Statute providing a punishment or penalty for the same offense, one providing a greater and one a lesser, the section providing the greater is abrogated by the one prescribed the lesser. . . ." After oral argument, a memorandum was submitted outlining the pertinent

principles of law relating to certain of the bases of the defendant's motion.

During the trial of the case, "the defense made a motion that the State be required to elect whether they are trying this case under sections 11(a) or 11(b) of Article 62 of the Code (Testimony pg. 1).

In the Court of Appeals of Maryland, Federal questions were presented in that counsel argued among other things that:

> "Section 11(b) of Article 62 does not apply to unsworn statements, that it must be construed in favor of the defendants, that it is patently ambiguous, and should be construed to prescribe only to sworn statements. If Section 11(b) is construed to apply to unsworn statements then it is unconstitutional."

STATUTES INVOLVED

Art. 62, Section 11(a).
Art. 62, Section 11(b).
Article 19, Maryland Declaration of Rights.
Article 23, Maryland Declaration of Rights.

THE QUESTIONS ARE SUBSTANTIAL

The Appellants respectfully represent that Section 11(b) of Article 62 of the Maryland Annotated Code (1957) does not apply to unsworn statements, that prior to this indictment, no prosecution has been instituted under this Section, nor has any court in the State of Maryland been called upon to construe the Statute. The Appellant further contends that the issuing of a false certificate not under an oath or affirmation was not tantamount to perjury. *State v. Baldwin*, 109 Vt. 143, 194 A. 372.

At common law a charge of perjury could be made only upon an oath lawfully administered in a proceeding before

a Court of Justice. 4 *Blackstone Comm.* 137. It is a general principle that the charge cannot be supported upon an oath, however false which is not required or authorized by some provision of law, even though the official before whom it is taken is empowered to perform the ministerial act of administering it. *U. S. v. Duport* (D.C.), 176 F. 823, 824; *State v. Larson*, 171 Minn. 246, 249, 213 N.W. 900, 901. This has been cited in connection with cases dealing with marriage license applications. *State v. Theriot*, 50 La. Ann. 1187, 24 So. 179; *State v. Carpenter*, 164 Mo. 588, 65 S.W. 255; *Davidson v. State*, 22 Tex. App. 372, 3 S.W. 662; *Russ & R.C.C.*, 459, 168 Eng. Reprint. 897.

In *State v. Baldwin*, 109 Vt. 143, 194 A. 372, the question was whether the oaths sworn to by the respondent were required by some provision of the Statute Law.

Courts have held that if a false statement be made in an oath or affidavit "required by law" or made in the course of a "judicial proceeding" the offense is perjury; if the false voluntary oath or affidavit is not required by law or made in the course of a judicial proceeding then it is false swearing. *Langford v. State*, 9 Tex. App. 283; *Steber v. State*, 23 Tex. App. 126, 4 S.E. 880; *Davidson v. State*, 22 Tex. App. 372, 3 S.W. 662.

In England a false oath taken before a surrogate to deceive him into granting improperly a marriage certificate though not perjury, is a criminal misdemeanor. 2 Bish. Crim. Law, 7th Ed. 1029. There are many cases throughout the United States which have held that where applicants for marriage licenses make false affidavits to secure the same, they are guilty of perjury. *State v. Floto*, 81 Md. 600, 32 A. 2d 315, 101 A.L.R. 1263; *Cox v. State* (1924), 164 Ark. 126, 261 S.W. 303; *People v. Kelley*, 59 Cal. 372; *People*

v. Mankin, 225 Mich. 246, 196 N.W. 426; *State v. Randall*, 166 Minn. 381, 208 N.W. 14.

The appellant in this case did not make an oath nor an affidavit but only signed a *certificate*.

California Employment v. Malm, 138 P. 2d 744, stated a "certificate" has been defined in *Merrell v. Tece*, 104 U.S. 557, 26 L. Ed. 854; "A certificate under seal, when invested with legal force and effect is a solemn instrument and ought to be complete, certain and final in itself, without any collateral addition or commentary. Its very form and character as a certificate presuppose that it has the verification and protection of the authenticating signature and seal"; and in *Dolan v. U.S.*, 8 Cir. 133 F. 440, 449, a certificate is defined as "a written testimony to the truth of any fact, a written declaration legally authenticated; . . . Popularly the term certificate would import a document in which the officer issuing the same purports to state on his own authority that certain acts have been done." See *State's Rights Democratic Party v. Bd. of Election*, 49 S.E. 2d 379, 229 N.C. 179.

"To certify" as that term is ordinarily used with reference to documents or papers is to affirm or to assert in writing the correctness or identity of the designated instruments. No written words are necessary to create a valid certificate. *Harting v. Celrian*, 51 P. 2d 195; *U.S. v. Ambrose*, 108 U.S. 336, 2 Sup. Ct. Rep. 682.

The written statement and the *oath* of the party that it is true all constitutes the declaration and certificate of the Statute.

The appellant further contends that Article 62, Section 11(a) and Article 62, Section 11(b) of the Maryland Annotated Code are in direct conflict regarding its penal pro-

visions and that this conflict creates an irreconcilable difference, making the entire penal provision of Article 62 unconstitutional, or, in the alternative, making the greater punishment abrogated by the lesser punishment. C.J.S., Criminal Law, Section 1979, note 75.

Sutherland on *Statutory Construction* (3rd Ed.), the leading treatise in the field, states that the general rule is that: Penal Statutes are strictly construed. *Wanzer v. State*, 202 Md. 601, 97 A. 2d 914, 918 (1953). ". . . the Courts are committed to a strict construction in favor of the citizen and against the State." *Healy v. State*, 115 Md. 337. The courts may not go beyond the Statutes to speculate as to the Legislature's purpose or resolve a Legislative conflict. *Cearfoss v. State*, 42 Md. 403.

The appellant further contends that his Constitutional rights were violated in that the Appellant moved at the beginning of the trial to require the State to elect as to whether it was proceeding under Section 11(a) or Section 11(b) of Article 62 of the Maryland Annotated Code. That the Court denied the motion, but remarked "whether . . . he should be punished under Section 11(a) or 11(b) is a matter to be considered; if and when that point in the case is reached." That the Appellant was further deprived of his constitutional rights of not being apprised of what statutory provision he was to have violated, the indictment being silent as to this. It has long been the rule of both the National and State Courts that penal statutes are subject to the Rule of strict construction, and if a penal statute contains a patent ambiguity and admits two reasonable constructions that which operates in favor of a party accused under its provisions is to be preferred, and the Statute will not be extended in its scope to include other

offenses than those which are clearly described and provided for. *Speeter v. U.S.*, 42 F. 2d 937.

The Appellant contends that the penalty attached to an offense is of importance to the accused. It may mean the difference between prison and a fine, a felony or a misdemeanor, further he is greatly concerned about his life or liberty being jeopardized once he is about the possibility of a second attempt to charge him with the same offense. *State v. Spencer*, 6 Utah , 117 P. 2d 455.

Perjury is one of the more serious offenses known to the law. A person convicted of perjury is statutorily deprived of his right to be a witness. Article 35, Maryland Code, Section 1, and is forbidden to act as the executor of an estate. Article 93, Maryland Code, Sections 58-60. But more important, by Article I, Section 2 of the Constitution of this State, a perjurer is disenfranchised. That provision reads:

> "No person above the age of twenty-one years convicted of larceny or other infamous crime, unless pardoned by the Governor, shall ever thereafter, be entitled to vote at any election in this State. . . ."

Since it has been repeatedly held in Maryland that perjury is an infamous crime, *State v. Birler*, 62 Md. 354 (1884); *State v. Floto*, 81 Md. 600, 32 A. 315 (1895); *Garitee v. Bond*, 102 Md. 379, 62 A. 631 (1905), the effect of holding that Section 11(b) applies to unsworn statements is to transform into perjurers and infamous criminals persons who would not normally fall within the extreme sanctions of Article I, Section 2. If Section 11(b) be so construed the result would be an indavertent attempt by the Legislature to amend the Constitution, in a manner repugnant to Article XIV thereof

The Legislature cannot by its fiat create new crimes and endow them with a label to make them infamous.

> "The Constitution in providing for exclusion from sufferage of those persons whose character was too bad to be permitted to vote could only have intended by the language used such crimes as were infamous at common-law, and are described as such by common-law authorities." *State v. Bixler*, supra, at 360.

We cannot conceive that the Legislature would be constitutionally permitted to create a crime unknown to the common law and by making the offender a perjurer, disenfranchise him.

Let it not be thought from what we have said that we believe that the Legislature intended to disenfranchise persons making unsworn, untrue statements in violation of the marriage law. Quite to the contrary, it has been our earnest contention that Section 11(b) was designed to proscribe false *sworn* statements and it was for that reason the word "perjury" was used.

But if Section 11(b) be construed to transform persons who make unsworn false statements into perjurers, then it makes an infamous crime of behavior not regarded as infamous by the common law, and must be held offensive to the Constitution.

CONCLUSION

For all of the reasons hereinabove cited, it is respectfully submitted that the questions raised by this Appeal are substantial and of public importance and should be respectfully received by this Honorable Court.

It is submitted that the Decision of the Court of Appeals of Maryland is contra to the Constitution of the United States.

Respectfully submitted,

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SIDNEY SCHLACHMAN,

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For Appellants.

APPENDIX A

MARRIAGE LAW

Article 62:

9. (a) It shall be unlawful within the State for any female below the age of sixteen years or any male below the age of eighteen years to marry, or for a parent or guardian to permit any such female or male to marry, or for any female between the ages of sixteen and eighteen years, or for any male under the age of twenty one years to marry, unless the parent or guardian of such male or female, in person or by signed affidavit, assent thereto, and, in the case of a female, swear or affirm that she is over the age of sixteen years, and, in the case of a male, swear or affirm that he is over the age of eighteen years. Provided, however, that on the certificate of a licensed physician, presented with the application for a marriage license, to the effect that the girl is pregnant or has given birth to a child, a marriage license may be issued without the consent of her parent or guardian, and if the putative father of the child or prospective child of a girl under eighteen years of age is over sixteen years of age, a marriage license may be issued without the consent of his parents or guardian.

(b) After the issuance of a license upon presentation of such certificate the Clerk of the Court issuing such license shall seal said certificate. Said seal shall not be broken, and said certificate shall not be inspected by any person, including the parties to the proceeding, except upon order of the Court.

(c) All such records which have been sealed as required by the provisions of this section as amended by Chapter 105 of the Acts of 1947, shall, immediately after June 1, 1951, be broken and the records recorded and indexed as in the case of other marriage records, and shall also be reported to the State Department of Health as if such records had never been sealed. The certificates of the physician

shall again be sealed and kept as required by sub-section (b) of this section.

10. When either of the contracting parties is known to be within the provisions of Section 9, it shall be the duty of any Clerk of the Court, before issuing a license, or of any minister, before performing a ceremony pursuant to publication, or of the witnesses at a Quaker ceremony, to demand the assent and statement required by Section 9 and thereafter to make said assent and statement, if written, or the fact thereof, if made in person, a part of the record required hereunder; provided, however, that the certificate of a licensed physician, referred to in Section 9 shall be made a part of such record.

11. (a) Any person violating the provisions of Sections 9 and 10 shall be guilty of a misdemeanor and upon conviction thereof, shall be subject to a fine of not less than $25.00 and not more than $250.00.

(b) Any person who shall knowingly make any material false statement to procure, or to assist any other person to procure, any license or marriage ceremony in violation of the provisions of this Article, or any order of court pursuant to Section 6 hereof, shall be guilty and punished for perjury.

PERJURY PROVISIONS

Article 27, Section 435:

An oath or affirmation, if made wilfully and falsely in any of the following cases, shall be deemed perjury: First, in all cases where false swearing would be perjury at common law; secondly, in all affidavits required by law to be taken; thirdly, all affidavits to accounts or claims made for the purpose of inducing any court or officer to pass such accounts or claims; fourthly, all affidavits required to be made to reports and returns made to the general assembly or any officer of the government; fifthly, all affidavits or affirmations made pursuant to the Maryland Rules.

Article 27, Section 439:

Every person who shall be convicted of perjury or subornation of perjury shall be sentenced to imprisonment in jail or penitentiary for not more than ten years.

Article 2B, Section 198:

If any signed statement, report, affidavit, or oath, required under any of the provisions of this Article (relating to alcoholic beverages) shall contain any false statement, the offender shall be deemed guilty of perjury, and upon conviction thereof, shall be subject to the penalties provided by law for that crime.

Article 11, Section 44:

. . . [A]ny person making oath to false statements in such report [to the Bank Commissioner] shall be deemed guilty of perjury, and upon conviction shall be subject to the penalties provided by law for that offense.

Article 17, Section 26:

Any clerk [of the court] who shall be guilty of false swearing taking the oath required by the preceding section and constitution, in returning to the comptroller an account of the receipts and expenses of his office, with the intention to deceive and defraud the treasury, shall be guilty of perjury.

Article 24, Section 10(b):

Any wilful false swearing or any oath or affidavit under the provisions of this sub-title [as to deposits for lawsuits] shall be punishable as perjury under the criminal laws of the State.

Article 33, Section 225:

Any wilfully false statement or entry made by any candidate for office, treasurer, or political agent, or by any member or officer of any political committee, in any statement or account under oath required by article, shall

constitute the crime of perjury, and be punished as such according to the laws of this State.

Article 40, Section 30:

. . . . False swearing by any witness before the [Legislative] Council shall constitute and be punishable as perjury.

Article 41, Section 123:

[F]alse swearing on the part of any witness testifying before said members of said Board of Parole and Probation on a matter material to inquiry shall be deemed perjury.

Article 43, Section 263:

Every applicant for examination [as a pharmacist] shall, with his application to the secretary of the Board, file a written declaration, duly sworn to before a justice of the peace or a notary public, stating the pharmacy or pharmacies in which he has had the experience demanded in §261. Anyone swearing falsely in the affidavit so filed shall be deemed guilty of perjury.

Article 48A, Section 82:

Any person or company violating any provision of any section of this Article for which no specific penalty is therein provided, or any order or ruling of the Commissioner which he is authorized to promulgate, shall be deemed guilty of a misdemeanor and shall be subject to a fine of One Thousand Dollars for each and every such offense. Any person making any wilfully false statement, report or other written document required by any section of this Article to be filed with the Commissioner under oath, or while under oath administered by the Commissioner or Examiner which they are authorized by this Article to administer, at any investigation or hearing conducted by said Commissioner, Deputy Commissioner or Examiner, which they are authorized to conduct, shall be deemed

guilty of perjury and shall be proceeded against and punished as provided by the statutes of this State in relation to the crime of perjury.

Article 81, Section 5:

Every report required by this Article shall be deemed to have been made under oath if it contains a declaration preceding the signature of the maker, to the effect that it is made under the penalties of perjury.

Article 85A, Section 13:

Every person who . . . shall be in the employ of the State of Maryland . . . shall be required . . . to make a written statement which shall contain notice that it is subject to the penalties of perjury, that he or she is not a subversive person as defined in this article . . .

Article 85A, Section 17:

Every written statement made pursuant to this Article by an applicant for appointment or employment, or by any employee, shall be deemed to have been made under oath if it contains a declaration preceding the signature of the maker to the effect that it is made under the penalties of perjury. Any person who makes a material misstatement of fact (a) in any such written statement, or (b) in any affidavit made pursuant to the provisions of this Article, or (c) under oath in any hearing conducted by any agency of the state, or of any of its political subdivisions, pursuant to this Article, or (d) in any written statement by an applicant for appointment or employment or by an employee in any State and/or private institution of learning in this state intended to determine whether or not such applicant or employee is a subversive person as defined in this Article, which statement contains notice that it is subject to the penalties of perjury, shall be subject to the penalties of perjury prescribed in Article 27, §439 of the Annotated Code.

Article 93, Section 305:

Any register [of wills] who shall be guilty of false swearing in taking the oath required by §303, with the intention to deceive and defraud the treasury, shall be guilty of perjury.

DECLARATION OF RIGHTS

Article 19. Remedy for injury to person or property. That every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the land.

Article 23. *Due Process.* That no man ought to be taken or imprisoned or disseized of his freehold liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.

APPENDIX B

In the Court of Appeals of Maryland

No. 50, September Term, 1959

Jacob J. Greenwald,

v.

State of Maryland.

Before: Brune, C.J., Henderson, Hammond, Prescott, Horney, JJ.

Opinion by Horney, J.

Filed: November 23, 1959

When Jacob J. Greenwald (the defendant), a medical doctor, was convicted by a jury in Talbot County — to which this case and others had been removed for trial — of violating a law concerning the marriage of minors and sentenced to three years in the Maryland Penitentiary, the defendant, claiming several errors, appealed.

On July 14, 1958, the grand jury of Cecil County (in which Elkton, the county seat, has been a Gretna Green for years) returned eighty-five indictments against the defendant. Forty-two of them, including this case, charged the defendant with perjury. The other forty-three, of which *Greenwald v. State,* Md. , A. 2d (1959) [No. 43 September Term 1959] is one, charged the defendant and E. Leland Ott with a conspiracy to commit the offenses charged in the perjury indictments.

In substance the defendant was charged in this case with having, on February 6, 1958, unlawfully and knowingly made a material false statement by certifying that he had examined a girl and found her to be pregnant, when in fact he had not made a physical examination to determine pregnancy, and when in fact the girl was not at that time pregnant, in order to assist the girl and her boy companion to procure a license to marry.

Code (1957), Art. 62, §11, provides in part as follows:

> "(a) *Fine.* — Any person violating the provisions of §§9 and 10 concerning the marriage of minors, which, *inter alia*, require the assent of the parent or guardian if the girl is under sixteen or the boy is under eighteen, and then provide that a marriage license may be issued without the required consent if the putative father is over sixteen, on the certificate of a licensed physician presented with the application to the effect that the girl is pregnant or has given birth to a child shall be guilty of a misdemeanor and upon conviction thereof, shall be subject to a fine of not less than $25.00 and not more than $250.00.
>
> "(b) *False statement.* — Any person who shall knowingly make any material false statement to procure, or to assist any other person to procure, any license or marriage ceremony in violation of the provisions of this Article, * * * shall be guilty and punished for perjury."

It is obvious that the indictment in this case was based on §11(b), *supra*, and the lower court in its charge so advised the jury.

The facts are not controverted. On February 6, 1958, a boy, who was then under eighteen, went to Elkton in the company of a boy friend and their respective girl companions for the purpose of getting married. The boy went to the clerk's office and made application for a marriage license. After the application had been made he went by taxicab to the defendant's office with the other boy. The girls did not accompany them. The defendant was at his

desk and as they approached him he stated that he understood their girls were pregnant. They replied in the affirmative, which was untrue so far as the boy's bride-to-be was concerned, but may have been correct so far as the prospective wife of the boy friend was concerned. When asked by the defendant, both boys informed him that the girls were three and one-half months pregnant. The defendant also inquired as to the girls' names and residences. When this information had been supplied, the defendant filled out two certificates and gave them to the boys. The certificate given to each boy certified that the defendant had examined his girl companion and had found her to be three and one-half months pregnant. The entire visit to the office lasted about five minutes. Four days later, the boy went to the clerk's office again, gave the clerk the pregnancy certificate he had received from the defendant and procured a marriage license on the basis of the certificate. The boy and girl were married the same day.

On this appeal, the defendant contends (i) that §11(b), *supra*, does not apply to unsworn statements; (ii) that, if it does, then it is unconstitutional; (iii) that even if the section does apply to unsworn statements and is constitutional, the defendant ought to have been punished under §11(a), *supra*; and (iv) that his motion to dismiss the indictment should have been granted because the indictment is defective for the reason it failed to allege wilfulness.

(i) and (ii)

Section 11(b), *supra*, applies to unsworn statements and is constitutional. The defendant urges that because the true meaning of the statute is in doubt a strict construction is required, that the statute is patently ambiguous because it requires punishment for perjury without specifying that the prescribed material false statement had to be made under oath, and, therefore, that the statute should be construed to proscribe false unsworn statements. We do not agree with any of the defendant's premises. On the contrary, it cannot be disputed that the Legislature, in enacting §11 of Art. 62, *supra*, provided, by the terms of

§11(a) that violations of §§9 and 10 were misdemeanors subject to a fine of $25 to $250. But, at the same time, by the terms of §11(b), the Legislature created an offense analogous to perjury prohibiting the making of a material false statement in connection with the procurement of a marriage license or ceremony, and then provided an oath-substitute, which though novel is not prohibited. The term "oath" is often used in its broadest sense "to include all forms of attestation by which a party signifies that he is bound in conscience to perform the act faithfully and truly." 3 Bouv. Law Dict., p. 2388 (8th ed. 1914), quoted in *State v. Gay*, 59 Minn. 6, 60 N.W. 676 (1894). See also Maryland Rule 5 c. Viewed in this light, the terms of §11(b) are clear and definite despite the fact they are expressed in somewhat inartificial language. The legislative history unerringly points to the fact that the word "of"[1] was inadvertently omitted from the statute, but with or without the absent word there can be no doubt that the offense condemned by the statute as stated above is in the nature of perjury. However, by the terms of §11(b), the very making of a material false statement, even though not under oath, has been substituted for the oath usually required to make a false statement perjurous. Furthermore, there is not the slighest doubt that the Legislature had the power to define what acts shall constitute criminal offenses and what penalties shall be inflicted on offenders, the only limitation being that such enactments shall not infringe on constitutional rights and privileges. *Glickfield v. State*, 203 Md. 400, 404, 101 A. 2d 229, 231 (1953); *State v. Seney Company*, 134 Md. 437, 107 Atl. 189 (1919); 14 Am. Jur., *Criminal Law*, §16.

The further argument to the effect that the false statement contemplated by §11(b), *supra*, has reference to something more than the certificate of a physician as to pregnancy — which was based on the requirement of §9(a), *supra*, that the signed affidavit to the assent of a parent or guardian should be sworn to or affirmed but did not make

[1] When the omitted word is restored, the statute provides that offenders thereof "shall be guilty [of] and punished for perjury."

the same requirement as to the certificate of a physician — is also without merit for the simple reason that the language of §11(b) includes all material false statements, whether sworn or unsworn.

Obviously from what has been said there is no reason why the Legislature could not remove the requirement of an oath, and in this instance it has explicity and effectually done so by providing a non-oath substitute for it as it has done several times before.[2] In this connection, it is interesting to note that an affirmation — which is without doubt the earliest of such substitutions in this or any other jurisdiction — is by statute or rule defined as a solemn [*i.e.*, according to strict form or formal] declaration made under the penalties of perjury that a certain statement of fact is true. See Rule 5 c, *supra*. All such substitutions, however, either directly or impliedly are made the equivalent of an oath. It is implicit in §11(b), *supra*, that the oath-substitute is the equivalent of an oath.

With respect to the question of constitutionality, the defendant argues that §11(b), *supra*, is vague and indefinite and that the statute should be construed as an inadvertent legislative attempt to amend the state constitution. Again we do not agree. As to the first contention, we need only repeat what we have already said that the statute is neither vague nor indefinite and add that it does not affront the constitutional guarantees of due process. This is so because it is explicit enough to enable a person of ordinary intelligence to ascertain with a fair degree of certainty what it prohibits and what conduct on the offender's part will render him liable to its penalties. *McGowan v. State*, 220 Md. 117, 125, 151 A. 2d 156, 160 (1959). The further contention that the statute is vague because the jury had to guess at its meaning and seemingly differed as to its application is likewise without substance. Cf. *McGowan v. State*, *supra*. The claim is that the forelady's request for ad-

[2] See, for example, Code (1957), Art. 2B, §198 [false statement under alcoholic beverage laws]; Art. 81, §5 [false report required by revenue and tax laws]; and Art. 85A, §§13, 17 [false statement of employees under sedition and subversive laws].

ditional instructions at the conclusion of the trial clearly demonstrated that the jury was confused — if it found the defendant guilty — as to whether the verdict should be guilty of perjury under §11(b), or guilty of a misdemeanor under §11(a). The lower court quite properly informed the jury that its verdict should be either guilty or not guilty since the court had already informed the jury in its general instructions in no uncertain words that the indictment charged the defendant with a violation of §11(b). It is unfortunate that the court read the provisions of §11(a) to the jury in that the defendant was not charged under that section; but, since it did so, the additional comments made by the court in an effort to alleviate the obvious confusion might have been more explicit. However, be that as it may, there was no error because the jury's inquiry had reference to the form of the verdict only, as to which the court's additional instruction was ample. Moreover, the record is clear that the forelady — after the colloquy between her, the court and counsel for the defendant — stated that she *then* understood the court's instruction, all of which transpired before the jury had retired to consider its verdict.

The defendant also submitted a very strained argument that to call the making of a false statement not under oath by the name of perjury and to provide for its punishment as such would amount to a legislative attempt to amend the constitution as to disqualification from voting because of a conviction for infamous crime. This argument was to the effect that perjury is an infamous crime of which a false oath was an essential element at common law; that the disfranchisement provision of Art. I, §2, of the Constitution of this State based upon a conviction for an infamous crime operate only with respect to crimes which were infamous at common law, [citing *State v. Bixler*, 62 Md. 354 (1884)]; that to denominate the making of a false statement not under oath as perjury undertook to make an infamous crime out of an offense which was not such at common law; and therefore violates the constitutional provision referred to. This conclusion is a clear *non sequitur*. Even if we assume that no newly created crime could be an in-

famous crime because it was not known to the common law, the fact that the penalty of disfranchisement may not be constitutionally possible does not remove the prescribed act from the category of criminal conduct, which is subject to punishment under the statute denouncing the offense. What the defendant's voting rights may be in the future are not before us now.

(iii)

The sentencing of the defendant under §11(b), *supra*, was proper. The defendant contends — because the indictment made no reference to §11(b) — that he ought to have been punished under §11(a). Again, we do not agree. The indictment in this case, substantially in the language of the statute, unquestionably charged the defendant with a violation under §11(b), and, having been convicted thereunder, he was subject to the punishment therein provided. The fact that the court — in denying the defendant's motion at the beginning of the trial to require the State to elect between §11(a) and §11(b) — remarked that the matter would be considered if and when the question of punishment was reached, did not commit the court to fine the defendant rather than imprison him. Nor was it error to resolve the question as it did after the defendant had been convicted. Moreover, we think it is clear that the statute did not provide different penalties for the same offense. On the contrary, the statute permits the grand jury [on a presentment and indictment] or the state's attorney [on an information] to determine whether to prosecute an alleged offender for a violation of the provisions of the statute not included in §11(b) or for the more serious offense of perjury under §11(b) when it appears that a material false statement has been knowingly made. Furthermore, it appears that the defendant may have waived the point when he did not object to the court's specific instruction to the jury that the defendant was charged with a violation of §11(b).

(iv)

Lastly, the indictment was not defective because it failed to allege wilfulness. The defendant's contention that his pretrial motion to dismiss the indictment should have been granted is without merit. Since it is sufficient if statutory offenses are charged in the language of the statute creating them, the indictment in this case charging the defendant with "knowingly," instead of "wilfully," making a material false statement was sufficient to state the offense charged. *Parkinson v. State*, 14 Md. 184, 198 (1859); *Gibson v. State*, 54 Md. 447, 451 (1880); *State v. Lassotovich*, 162 Md. 147, 159 Atl. 362 (1932). Moreover, it has been held that the word "wilfully" is of similar import to the word "knowingly" and is the same in substance and effect. [*Hutchman v. State*, 61 Okla. Crim. 117, 122, 66 P. 2d 99, 102 (1937)]; and that one may be the equivalent of the other [*McClure v. State*, 157 Miss. 800, 805, 128 So. 764, 765 (1930)].

The judgment must be affirmed.

JUDGMENT AFFIRMED, THE APPELLANT TO PAY THE COSTS.

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SUPREME COURT, U.S.
FILED
MAY 12 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

NO. 859

JACOB J. GREENWALD,

Appellant,

vs.

STATE OF MARYLAND,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM AND BRIEF IN SUPPORT THEREOF

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ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, respectfully moves this Honorable Court to dismiss the above entitled appeal or, in the alternative, to affirm the judgment of the Court of Appeals of Maryland on the ground that the appeal fails to present any substantial federal question.

OPINION BELOW

The opinion of the Court of Appeals is reported in 221 Md. 235, 155 A. 2d 894. A companion case where the Appellant was convicted of conspiracy is *Greenwald v. State*, 221 Md. 245, 157 A. 2d 119.

STATEMENT

This is a direct appeal from the judgment of the Court of Appeals of Maryland the opinion of which was filed on November 23, 1959. After a motion for reargument was denied and the opinion modified, the mandate of the Court was issued on January 12, 1960. The Court of Appeals affirmed the judgment of the Circuit Court for Talbot County.

Jacob J. Greenwald, the Appellant, a practicing physician, had been indicted by the Grand Jury of Cecil County, Maryland, on forty-two charges of unlawfully and knowingly making material false statements to the effect that he had physically examined certain named female persons and that he had found them to be pregnant when, in fact, the females named had not been physically examined and were not pregnant, for the purpose of assisting them in obtaining a marriage license. Forty-three other indictments charged the Appellant with unlawful conspiracy to commit the offenses; however, this Honorable Court is not concerned with those indictments in the present case.

Judge Horney, writing the opinion for the Court of Appeals of Maryland, states the following facts:

> "The facts are not controverted. On February 6, 1958, a boy, who was then under eighteen, went to Elkton in the company of a boy friend and their respective girl companions for the purpose of getting married. The boy went to the clerk's office and made application for a marriage license. After the application had been made he went by taxicab to the defendant's office with the other boy. The girls did not accompany them. The defendant was at his desk and as they approached him he stated that he understood their girls were pregnant. They replied in the affirmative, which was untrue so far as the boy's bride-to-be was concerned, but may have been correct so far as the

prospective wife of the boy friend was concerned. When asked by the defendant, both boys informed him that the girls were three and one-half months pregnant. The defendant also inquired as to the girls' names and residences. When this information had been supplied, the defendant filled out two certificates and gave them to the boys. The certificate given to each boy certified that the defendant had examined his girl companion and had found her to be three and one-half months pregnant. The entire visit to the office lasted about five minutes. Four days later, the boy went to the clerk's office again, gave the clerk the pregnancy certificate he had received from the defendant and procured a marriage license on the basis of the certificate. The boy and girl were married the same day."

On October 10, 1958, the case was removed to Talbot County, Maryland where the Appellant was found guilty as charged and was sentenced to be confined in the Maryland Penitentiary for a period of three (3) years.

On appeal to the Court of Appeals of Maryland the Appellant contended that Section 11(b) of Article 62, Annotated Code of Maryland (1957 Edition) did not apply to unsworn statements and further that if it did, then it was unconstitutional. He further contended in the Court of Appeals of Maryland that even if the section applies to unsworn statements and is constitutional, the Appellant should have been punished under Section 11(a) of Article 62 and that his Motion to Dismiss the indictment which was filed in the trial court should have been granted because the indictment was defective for the reason that it failed to allege willfulness. The Maryland Court of Appeals found that these contentions were without merit and, therefore, affirmed the judgment of the trial court in convicting the Appellant.

ARGUMENT

The decision of the Court of Appeals of Maryland is Clearly Correct and No Substantial Federal Question Is Presented in the Appeal.

The Appellant contends that Section 11(b) of Article 62, Annotated Code of Maryland (1957 Edition) violates his rights under the United States Constitution in that this section is inapplicable to unsworn statements and that there was no perpetration of the crime of perjury. In the Court of Appeals of Maryland he further contended that this section was unconstitutional due to the fact that it was vague and indefinite. The marriage laws of Maryland require the assent of the parent or guardian if the girl is under sixteen or the boy is under eighteen. As to the marriage of minors the law provides that a marriage license may be issued without the required consent if the putative father is over sixteen, on the certificate of a licensed physician presented with the application for the marriage license to the effect that the girl is pregnant or has given birth to a child. Section 11(b) of Article 62, which the Appellant was convicted of violating, provides as follows:

> "*False statement.* — Any person who shall knowingly make any material false statement to procure, or to assist any other person to procure, any license or marriage ceremony in violation of the provisions of this Article * * * shall be guilty and punished for perjury."

The indictment in this case did not specifically state that this was a violation of Section 11(b); however, it is obvious from reading the indictment in this case that the indictment was based on Section 11(b) and the trial court in its charge so advised the jury.

The general law is that the Legislature has the power to define what Acts shall constitute criminal offenses and what penalties shall be inflicted on offenders and generally to enact all laws deemed necessary for the protection of public and private rights. 14 Am. Jur., *Criminal Law* 16. However, its power must be exercised subject to constitutional guarantees of due process of law. The Maryland Legislature, in enacting Section 11 of Article 62, supra, provided by the terms of Section 11(a) that violations of Sections 9 and 10 were misdemeanors subject to a fine of $25.00 to $250.00, but at the same time by the terms of Section 11(b) the Maryland Legislature created an offense analogous to perjury prohibiting the making of a material false statement in connection with the procuring of a marriage license or ceremony and then as the Court of Appeals of Maryland stated "* * * provided an oath-substitute, which though novel, is not prohibited". The term "oath" is defined in Black's Law Dictionary, 4th Edition as:

> "any form of attestation by which a person signifies that he is bound in conscience to perform an act faithfully and truthfully."

Vaughn v. State, 146 Tex. Cr. R. 586, 177 S.W. 2d 59, 60. See also 3 Bouv. Law Dictionary, p. 2388 (8th Edition, 1914).

The courts in construing legislation should accord the language used by the Legislature to the ordinary and natural meaning wherever possible. In reading the statute in question, the language used leaves little doubt that the certificate of the physician would not be under oath or affidavit and if the same be false the party making the false statement is to be prosecuted and punished as for perjury. The terms of Section 11(b) are clear and definite and the statute provides in precise terms that the doing of certain

acts is a crime. The statute is sufficiently explicit to enable a person of ordinary intelligence to ascertain with a fair degree of precision what it prohibits and what conduct on his part will render him liable to its penalties. A statute is not violated for indefiniteness merely because it exacts the burden of rightly estimating a matter of degree or because juries may differ in their judgments in cases involving the same state of facts. *United States v. Petrillo*, 332 U.S. 1, 7; 91 L. Ed. 1877; *McGowan v. State*, 220 Md. 117, 151 A. 2d 156. In the ordinary everyday sense the word "certificate" is understood to simply mean a written statement giving testimony of the truth of any fact. *California Employment Commissioner v. Malin* (Calif.), 138 Pac. 2d 744 and *Dolan v. United States*, 133 Fed. 441. The Court of Appeals of Maryland in *Greenwald v. State*, 221 Md. 235, 240, 155 A. 2d 894, pointed out that the legislative history of Section 11(b) unerringly points to the fact that the word "of"* was inadvertently omitted from the statute, but with or without the absent word there can be no doubt that the offense condemned by the statute as stated above is in the nature of perjury.

It is obvious from what has been said that there is no reason why the Maryland Legislature could not remove the requirement of an oath and provide a non-oath substitute. The Maryland Legislature has done this several times before, for example, Article 2B, Section 198 (false statement under Alcoholic Beverage laws), Article 81, Section 5 (false report required by Revenue and Tax laws); and Article 85A, Sections 13, 17 (false statement of employees under sedation and subversive laws).

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* When the omitted word is restored, the statute provides that offenders thereof "shall be guilty (of) and punished for perjury."

The Appellant also contends that he should have been sentenced under Section 11(a) of Article 62, supra, since it imposed a lesser penalty than does Section 11(b). Section 11(a) reads as follows:

> "Any person violating the provisions of Secs. 8 and 10 shall be guilty of a misdemeanor and upon conviction thereof, shall be subject to a fine of not less than $25.00 and not more than $250.00."

Section 11(a) applies only to violations of the provisions of Sections 9 and 10 other than those constituting the making of material false statements. Wherever possible the provisions of a statement should be read together and given their true meaning. If the Maryland Legislature intended that Section 11(a) apply as the punishment for making material false statements there would have been no need for them to enact the provisions of Section 11(b). The two sections of the same statute were not intended to act as punishment for the same acts or offenses committed under the statute but were intended to apply to different violations under the same statute. There could be no violations other than the making of false statements under Sections 9 and 10 and they would be punishable under Section 11(a), while a person who knowingly makes a material false statement to procure a marriage license would be punished under Section 11(b) as in this case. Therefore, we submit it is clear that the statute did not provide different penalties for the same offense.

We submit that the decision of the Court of Appeals of Maryland, in affirming the conviction of the Appellant, is clearly correct and no substantial federal question is presented in this appeal.

CONCLUSION

It is respectfully submitted that, for the foregoing reasons, the Appellee's Motion to Dismiss the Appeal, or in the alternative to affirm the Judgment of the Court of Appeals of Maryland, should be granted.

Respectfully submitted,

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